

L’Affaire Jessica Hardy – Doping Violations and the Olympics: Ensuring Qualification and Competition by Clean Athletes: A Commentary[§]

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Abstract: Athletic competition should be to perform one’s best regardless of result. In an age of result-based endorsements and appearance fees, it is not surprising that doping remains a persistent problem in amateur athletics. The World Anti-Doping Agency (WADA) with World Anti-Doping Code (WADC) has been a positive force in “cleaning up” athletics. Yet, doping violations and National Olympic Committee (NOC) actions persist which betray innocent athletes. This case report addresses a complex pre-Olympic doping violation during the 2008 US Olympic Swimming Trials in which Jessica Hardy, who qualified in three events, tested positive for the anabolic agent clenbuterol, was nonetheless named to the US Olympic Team, lost her arbitration and then withdrew from the Olympic Team post credentialing deadline. This resulted in three qualified and “clean” swimmers (Tara Kirk, Lara Jackson, and Amanda Weir) being inappropriately excluded from the Olympics. Ethical recommendations to prevent future recurrences of inappropriate exclusions of athletes (correction of flawed selection criteria, improved communication regarding positive doping samples, credentialing of appropriate alternates in all sports), comparison of the original 2003 WADC (optional provisional suspension, 7.5) versus 2009 WADC (mandatory provisional suspension for positive “A” Sample Analytical Finding for an anabolic agent, 4.2.2/7.5.1) regulations, and post-Olympic considerations for the injured athletes are addressed.

Keywords: Ethics, olympics, doping, WADA, WADC, clenbuterol, anabolic agent, athletes, suspension, selection criteria.

INTRODUCTION

An athlete’s dream is to perform at his very best, to realize that he has put all his efforts into the competition, no matter what the final result. Yes, one competes with and against other athletes; but the true competition is within oneself, always striving to be better [1]. The excitement, sense of success, and contentment associated with personal bests cannot be overstated. Yet even when it is not a personal best, but rather the best that the athlete could do that day, regardless of the result, there still can be pride [2].

For an elite athlete, the ultimate challenge is to perform in the most competitive of settings, the Olympics [3]. The Olympic creed emphasizes participation and not victory as the true meaning of the Games: “The most important thing in the Olympic Games is not to win but to take part, just as the most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well [4]”. Yet, economics have corrupted the nobility of sport. It is no longer simply a question of the pleasure of competition, or the glory of athletic victory, or even the thrill of having done one’s best, rather

endorsements/appearance fees/ result bonuses are key factors which have led to increase use of performance enhancing agents and the need for the World Anti-Doping Agency (WADA), the World Anti-Doping Code (WADC) and the Prohibited List [5-9].

How sad it has become to witness tarnished medals secondary to performance enhancing agents [10-14]. Prior icons in sports now serve prison terms (Marion Jones, Tim Montgomery) [15-17]. The International Olympic Committee (IOC) usually reallocates medals but those moments of triumph in front of an international audience with anthems played and national flags displayed for all to bear witness cannot be repeated [18-20]. National euphoria and pride exist when a country obtains its very first medal ever in Olympic competition [21-25]. But what if this is only learned years later?

Perhaps the greatest tragedies are not doping violations during but rather before the Olympics, for such violations may result in athletes not being named to their national Olympic team. Athletes have a finite life at the elite level – not being named on that occasion may mean never being named to any Olympic team in the future [26-29]. Athletic performances are related to timing – peaking during the year for specific competitions as well as being at one’s lifetime athletic peak. Missing one Olympics may mean missing all Olympics.

There is a specific deadline for any National Olympic Committee (NOC) to name that country’s Olympic team; however, different sports may have different deadlines allowing flexibility. What if the team for that sport is named, but only after the deadline is it learned that a doping violation has

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occurred? Alternatively, what if the team is named and the doping violation is learned before the deadline for credentialing?

This case report addresses a complex pre-Olympic doping violation in which several athletes were inappropriately not credentialed for the Olympics. Appropriate recommendations are given such that this does not occur again.

METHOD

Case analysis with literature review.

RESULTS

An elite international swimmer who established the 100 meter breaststroke world record at the 2005 World Championships, Jessica Hardy qualified at the 2008 US Olympic Swimming Trials in three events – 100 meter breaststroke, 50 meter freestyle, and 4 X 100 meter freestyle relay [30]. She was tested three times during the Olympic swimming trials and was found to be positive on one occasion for the anabolic agent clenbuterol, a veterinary drug for asthma that is not approved by the FDA for any human therapeutic use, but is found in dietary supplements [9, 31-34]. The “A” sample positive result was available to USA Swimming (USAS) on the morning of the credentialing deadline date (twenty-first of July) [35]. The confirmatory positive result of the “B” sample was only learned after the deadline for credentialing had passed (twenty-second of July) [34, 35].

Though the positive “A” sample was known prior to the nomination deadline, USAS submitted Jessica Hardy for credentialing to the US Olympic Committee (USOC), did not substitute the next place finishers, and did not concomitantly list alternates for her events as the USA Swimming Athlete Selection Procedures do not permit such excluding relay pools [35, 36]. Further those Procedures specify that after twenty-first of July, any substitution of athletes must come from within the submitted official roster (IV.B.2) [36]. Jessica Hardy initially pursued an appeal, accepted the positive laboratory findings in an arbitration decision, and on first of August withdrew from the team post-deadline [37].

Only the first two finishers in individual swimming events qualify and are named to the Olympic team (I.D.1.b); as such, the third place finishers, who would have been submitted had Jessica Hardy been disqualified prior to twenty-first of July, were not credentialed for two individual events (Tara Kirk, breaststroke; Lara Jackson, freestyle) [31, 36]. Further, the freestyle relay includes a pool of six swimmers; most commonly, this pool is composed of the top six finishers from the 100 meter freestyle final (I.D.1.b) [36]. In this situation, had Jessica Hardy been disqualified secondary to her positive drug tests, the 8th place finisher (Amanda Weir) could have been named to the Olympics for the 7th place finisher (Kara Lynn Joyce) had already been added to the Olympic team as a relay pool qualifier when the winner of the 100 meter freestyle (Dara Torres) voluntarily withdrew from that event [38-40]. However, her name was not submitted as a relay alternate prior to the credentialing deadline.

Tara Kirk filed a demand for expedited arbitration on the fourth of August in which she appealed to be named to the Olympic Team and further sought revision of the USAS Selection Procedures and monetary damages; however, on the

fifth of August, the arbitrator found that USAS had followed their Selection Procedures and her appeal to be named to the Olympic Team was denied [41]. That decision addressed only her presence as an Olympic Team member and permitted her to pursue the other causes of action following the Olympics [41, 42]. Thus instead of naming Tara Kirk, Lara Jackson, and Amanda Weir to the Olympic Team, USAS chose from within the already submitted official roster Rebecca Soni and Kara Lynn Joyce as substitutes for Jessica Hardy in the 100 meter breaststroke and 50 meter freestyle, respectively [43].

Time line of events is summarized in Table 1.

DISCUSSION

There needs to be an ethical solution for this dilemma. It is one thing for an athlete to not be named secondary to having committed a doping violation, however innocent it may appear, for all elite athletes are aware of the World Anti-Doping Code (WADC), strict liability, and the use of Therapeutic Use Exemptions (TUEs) [5-9, 44-47]. It is another thing entirely to not be named because another athlete committed a doping violation, should have been banned from competition, was named anyway by the NOC, the deadline for credentialing has passed, and now the innocent athlete must look on in disbelief. It is even more disconcerting when the national sports federation and the NOC are aware of the doping violation prior to the credentialing deadline and do not substitute qualified athletes or list alternates.

L'affaire Jessica Hardy is a tragic confluence of flawed selection criteria and errors impacting three innocent athletes. First, the published USAS selection criteria did not include naming alternates for the Beijing Olympics though this is common in other sports (e.g., in gymnastics three alternates were named with the initial team and one gymnast, Alexander Artemev, was substituted for an injured Morgan Hamm less than 24 hours before the opening ceremonies) [36, 48-50]. Secondly, these same selection criteria dictated that once the official swimming team was submitted, after the twenty-first of July no athlete could be added and that any substitutions required would be named from within the already submitted team members [36]. Thirdly, although the doping samples taken at the US Olympic swimming trials had been marked expedited, by human error the UCLA Olympic Analytical Laboratory had logged the fourth of July Jessica Hardy sample for routine analysis [35]. This third point is critical for as a consequence, the positive “A” sample was only available on the eighteenth of July at which time it was faxed to the US Anti-Doping Agency (USADA) after hours on a Friday evening; however the USADA did not read this fax until Monday morning the twenty-first of July, the deadline date for submitting the team roster by the USAS to the USOC for credentialing [35]. On the twenty-second of July, the day following the deadline, the “B” sample was analyzed with a confirmatory positive result [34]. Having submitted Jessica Hardy as a team member on the twenty-first of July, by published selection criteria, the USAS argued that it was not permitted to add any further athletes [36, 51]. Fourthly, the apparent indifference by USAS and USOC with lack of pro-athlete optional decisions confronts the fundamental concept of spirit and letter of the law, specifically the WADC [7-9, 52-54]. Specifically, at the time of the 2008 USAS Olympic Trials, the original code was in effect which permits optional provisional suspension (7.5) for a positive “A”

Table 1. Time Line of Events – L’affaire Jessica Hardy

<p>July 4, 2008</p> <ul style="list-style-type: none"> - Two doping samples marked “A” and “B” were obtained from Jessica Hardy at the United States Olympic Swimming Trials. - “A” Sample was marked expedited to ensure USADA/USAS would have appropriate result prior to the nominating deadline.
<p>July 4, 2008 – July 18, 2008</p> <ul style="list-style-type: none"> - “A” Sample was mistakenly logged for routine analysis by the UCLA Olympic Analytic Laboratory delaying result.
<p>July 18, 2008</p> <ul style="list-style-type: none"> - Result of “A” sample was faxed to the USADA late on Friday July 18, 2008.
<p>July 21, 2008 (Deadline for roster submission by USAS to USOC)</p> <ul style="list-style-type: none"> - USADA did not read the fax until Monday July 21, 2008. - Result of “A” sample was positive for anabolic agent Clenbuterol. - Jessica Hardy was submitted by USAS to USOC for credentialing without providing alternates for her individual events or additions to the relay pools. - USA Swimming Athlete Selection Procedures specified any substitution of athletes must come from within the submitted official roster after the submission deadline.
<p>July 22, 2008</p> <ul style="list-style-type: none"> - “B” Sample analyzed with confirmatory positive result.
<p>July 23, 2008- August 1, 2008</p> <ul style="list-style-type: none"> - Jessica Hardy initiated an expedited appeal to remain on the 2008 US Olympic Team.
<p>August 1, 2008</p> <ul style="list-style-type: none"> - Jessica Hardy accepted the positive laboratory findings and received a two year period of ineligibility; the arbitration award permitted her to bring new evidence to reduce the length of her suspension. - Jessica Hardy withdrew from the 2008 US Olympic Team.
<p>August 4, 2008</p> <ul style="list-style-type: none"> - Tara Kirk filed for expedited arbitration to be named to the 2008 US Olympic Team.
<p>August 5, 2008</p> <ul style="list-style-type: none"> - The arbitrator for Tara Kirk’s appeal found that the USAS had followed their Selection Procedures and her appeal to be named to the 2008 US Olympic Team was denied; she was permitted to pursue further other causes of action (monetary damages and revision of Selection Procedures).
<p>May, 2009</p> <ul style="list-style-type: none"> - Tara Kirk and USAS settled these further causes of action, the terms of which were not announced through mutual agreement.

Sample Analytical Finding; however if the subsequent “B” sample analysis does not confirm the “A” sample finding, “it is still possible for the Athlete or team to be reinserted [7]”. This suggests that it would have been possible to provisionally suspend Jessica Hardy while adding Tara Kirk, Lara Jackson, and Amanda Weir to the Olympic team. Were Jessica Hardy to have a negative “B” sample and be reinstated, the other athletes could have remained on the Olympic team in the relay pools [36]. Of note, the WADC (4.2.2/7.5.1) which will become effective the first of January 2009 would require that Jessica Hardy receive a mandatory provisional suspension for a positive “A” Sample Analytical Finding for an anabolic agent – in this case, clenbuterol [8, 9]. By following the letter of the law, the USAS did not have to pursue an optional provisional suspension, but in light of the planned WADC changes it is surprising that the USAS did not do such. Clearly the spirit of the law and the ethics of sports were violated.

When this commentary on doping was written prior to the Olympic Games, the question then was “what to do now?” WADA with WADC was established to maintain an even playing field for all athletes – in essence to maintain fairness in competition [6, 7, 55]. Jessica Hardy can and did arbitrate the positive findings to remain on the US Olympic team, but USAS and USOC have obligations to all athletes [56]. In this instance, utilizing the spirit of the law (WADC) and basic concepts of ethics in sports, Tara Kirk, Lara Jackson, and Amanda Weir all

should have been submitted by USAS to USOC and onward to the Organizing Committee for the Olympic Games (OCOG) for credentialing. Were these three swimmers not submitted by USOC to OCOG, then the USAS through the International Swimming Federation (FINA) could appeal to the IOC Executive Board [57]. Similarly, were these swimmers submitted by USOC to OCOG but not accepted as credentialed entrants for the Olympic Games, then the USOC could appeal such decision directly to the Court of Arbitration for Sport (CAS) [57]. Only then will US athletes believe that the USOC is truly adhering to the concept of “competing on an even playing field” – disqualifying those who have taken banned substances, but ensuring that those who competed fairly earn their “ticket” to the Olympic Games and have that “ticket” punched [58]. Unfortunately, USAS and USOC did not present these athletes for credentialing prior to the Olympics and no appeals were sought from the IOC or before the CAS.

In an effort to rectify the apparent failure of the USAS to maintain its obligations toward all athletes, Tara Kirk filed an expedited arbitration against the USAS to be named to the Olympic Team; that she failed in this effort because the arbitrator found that USAS had followed its Selection Procedures did not mean that such procedures were not flawed [41, 42]. Ultimately, Tara Kirk continued to seek redress through arbitration both for monetary damages and to have the USAS acknowledge the need to revise its Selection Procedures

to preclude similar occurrences; this arbitration ended in a settlement (May 2009), the terms of which were not announced through mutual agreement [59, 60]. Neither Amanda Weir nor Lara Jackson pursued legal actions before or after the Olympics.

After the Beijing Olympics, the authors realized how intriguing this commentary truly is. For the authors argue, in the face of truly unprecedented performances by the US Swimming team, that it is not a question of how excellent an athlete may be, but whether that athlete has the right to compete on a given day [56, 61]. Specifically, Rebecca Soni returned from the Olympics with a silver medal in the 100 meter breaststroke (though the 4th place finisher at the Olympic trials, as she was already credentialed to the team for a different event, she was placed as substitute for Jessica Hardy in this event rather than Tara Kirk) and a gold medal with world record in the 200 meter breaststroke [56, 62, 63]. Would Tara Kirk have done better in the 100 meter breaststroke had she been credentialed? Would Tara Kirk have been placed on the 4 x 100 meter medley relay? It is not a question of how well she might have done, or what the medal count for a given nation is (truly an un-Olympic tally), but rather the purity of competition. That Rebecca Soni and Kara Lynn Joyce both medaled is a testament to their athletic greatness and the depth of the US Swimming team; but these medals do not eliminate the tarnished image of both USAS and the USOC for not credentialing the appropriate athletes.

The question now posed is “what to do in the future?” Strict adherence to the 2009 WADC with both optional and mandatory provisional suspensions (7.5.1/7.5.2) should assist in minimizing doping while maximizing qualification and competition by “clean” athletes [8]. Further approaches are also required. In this instance, USA Swimming Athlete Selection Procedures are considered flawed and should be revised accordingly; this may be applicable to other national federations [36, 64, 65]. Extra athletes to all events in all sports should be named as alternates pending results of all doping tests to ensure that sufficient athletes have been credentialed. Critical to doping control is improved speed of sample analyses with maximal communication of positive results (email, fax, and telephone) to ensure timeliness of findings. This last point is far-reaching and could ultimately result in disqualification of athletes in the midst of qualifying rounds as well as finals, be it in trials or the Olympics themselves, with a specific impact on the results of multiple events (the athlete may be competing in multiple events in addition to potential relays as occurred in the Jessica Hardy case).

Many athletes have commented on the significance of being an Olympian and how that can never be taken away from you – apparently it can be and was so done by the USAS and USOC to three deserving athletes. Although they will never be able to relive the past and participate in the 2008 Olympic Games, perhaps it is time for USAS and USOC to acknowledge the inherent errors that occurred in this case, address the necessity for reform, and retroactively name Tara Kirk, Lara Jackson, and Amanda Weir to the 2008 United States Olympic Team.

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